

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of)	
)	
Improving Public Safety Communications)	
in the 800 MHz Band)	
)	
Consolidating the 900 MHz Industrial/Land)	WT Docket No. 02-55
Transportation and Business Pool Channels)	

REPLY COMMENTS

Carolina Power and Light Company ("CP&L") and TXU Business Services ("TXU") (collectively, "Utilities"), by their attorneys, hereby submit the following reply comments with respect to comments submitted in response to the Notice of Proposal Rulemaking (the "Notice") in the above-referenced proceeding. Rather than even attempt to address every issue and sub-issue raised in the huge number of comments engendered by the Notice, the Utilities limit their reply to certain primary points, including the so-called "compromise plan" that has apparently been circulated by Nextel, and perhaps others, in post initial Comment "Talking Points" delivered to the Commission.

I. MASSIVE FORCED RELOCATION OF LICENSEES WHO ARE NOT THE CAUSE OF THE INTERFERENCE PROBLEMS THAT HAVE BEEN EXPERIENCED IS NOT THE ANSWER.

The comments demonstrate that massive mandatory relocation of licensees in the band is not a viable solution. The costs of such relocation would be enormous, running several billion dollars. There would risk terrible disruption in vital services, all for dubious benefit that might alleviate, but would, by no one's estimation, eliminate the problems of interference in the band.

It should now be clear from the comments that Nextel's original proposal to force massive relocation of utility and other critical infrastructures licensees out of the 800 MHz band is utterly unsupportable and should be treated, quite simply, as a dead letter. Perhaps itself seeing that it had overstepped, Nextel now has apparently been circulating "Talking Points" in which it sets forth certain elements of a "compromise proposal" for a more limited relocation of licensees, all still within the 800 MHz band. While the Utilities address certain elements of this proposal below, the point should be made here that, while reducing the number of licensees who would be required to relocate and keeping all within the 800 MHz band may be "less bad," that is hardly a justification, much less an endorsement, for requiring utility and other licensees to suffer substantial disruption to their operations and spend millions, if not billions, of dollars to alleviate – but by no means cure – problems of interference which Nextel has created.

II. STRICTER CONDITIONS FOR OPERATION IN THE 800 MHZ BAND NEED TO ESTABLISHED.

Even those proposing rebanding don't suggest that it would totally solve the interference problems that have been identified. At best, rebanding would alleviate some problems of interference, at tremendous disruption and cost.

By contrast, the introduction of additional conditions on operations in the band can work to alleviate the interference that has been experienced in the band, without massive disruption to, and huge costs imposed upon other licensees in the band whose operations are not the cause of the interference problems that have been experienced. Further, even if some relocation of licensees within the band may ultimately be determined to be required, or made voluntarily by individually negotiated solutions, as would be permitted by the far more modest rule changes suggested in the Utilities' initial Comments, tighter restrictions on operations in the 800 MHz band still will, in all events, be required.

Accordingly, the Utilities support the efforts and proposals of the United Telecom Council (“UTC”) to impose restrictions on operations in the band so as to address, head on, the interference problems that have been encountered. The Utilities believe that these restrictions, plus enforcement of existing rules against interference, will substantially resolve the problems that have been experienced in the band, without requiring any licensee relocation, except as may be voluntarily agreed in particular circumstances.

III. NEXTEL’S “COMPROMISE PLAN” DOES NOT REFLECT AN INDUSTRY CONSENSUS, HAS NOT BEEN NEGOTIATED WITH ALL AFFECTED PARTIES, AND REMAINS SEVERALLY FLAWED.

In the last few weeks, the Utilities have become aware of negotiations among certain parties to this proceeding (not including the Utilities) as to what might be presented by Nextel and others as a so-called “compromise proposal” in this proceeding. What exactly this plan will entail is not known to the Utilities, their visibility being limited largely to certain “Talking Points” which Nextel has distributed and, through UTC, certain questions (which neither Nextel nor other apparent proponents of the plan have yet to answer) about crucial matters of cost, implementation, and overall practical effect of the proposed plan on reducing the interference that has been caused by Nextel through its operations in the band.

Ordinarily, under these circumstances, the Utilities would refrain from any comment on such an incomplete and moving target. As discussed below, before any decision on any such “compromise plan” should be made, its details should be evaluated and negotiated among representatives of all parties and, ultimately, if deemed worthy of consideration, subject to a further notice and comment proceeding. Parties should not have to guess at what the “plan” will entail or have their participation in negotiations be relegated to the opportunity to ask questions, have them go largely unanswered, and be warned that, in so many words, they have no

choice but to sign on to the plan or to be swept up by it. Nevertheless, out of concern that the Commission may afford no other opportunity for comment, the Utilities offer the following comments on the “compromise plan” in the form in which it has been presented to them.

1. There Is No Showing That The “Compromise Plan” Will Be More Effective In Eliminating Interference Than The Imposition Of Far Less Disruptive Restrictions On Those Operating In The Band And Requiring Those Who Caused Interference To Cease Doing So.

The Utilities urge that, before requiring still massive relocation of licensees in the band, the Commission take a more forceful stance with Nextel requiring it to comply with the Commission’s rule against interference and live up to its past promises to resolve any interference that its operations might cause to public safety systems. Beyond this, there are specific requirements, as recommended by UTC, that the Commission can and should impose on 800 MHz licensees to alleviate much of the interference that has been experienced without any forced relocation of licensees to other frequencies.

The Utilities are frankly mystified as to why such efforts should not be the focus of this proceeding and, instead, there should be such an apparent rush to judgment that only a forced relocation of licensees, and (coincidentally) the grant to Nextel of a nationwide license for contiguous spectrum, will solve the interference problems that have been experienced. Nevertheless, to the extent that some form of rebanding as suggested in the “compromise proposal” may be determined to be required, the Utilities urge that conditions, consistent with the comments set forth below, also be established.

2. Utility And Other Critical Infrastructure Licensees Should Not Have to Bear the Costs of Relocation.

Utilities and other critical infrastructure licensees in the 800 MHz band have invested billions of dollars in systems employing the band. These systems are vital to the national security, protecting nuclear and other conventional power plants, power, gas, and water lines, workers operating in emergency and dangerous conditions, and the public they serve. There is nothing, in the record or otherwise, to suggest that utilities or other critical infrastructure licensees are in any respect the cause of the interference problems that have been experienced or support the notion that such licensees, and ultimately their consumer ratepayers, should be forced to bear the cost of changing the frequencies on which they operate so that another licensee (Nextel) can solve the interference problems which it has created and obtain the contiguous band of frequencies it so covets.

Yet, while the "Talking Points" refer to a Nextel "pledge" of \$500 million toward the costs that would be incurred by "public safety" licensees in changing frequencies, no compensation is offered for utility and other critical infrastructure licensees who would be required to relocate frequencies to accommodate Nextel's plan. There is no basis, and certainly none submitted in the record of this proceeding, for distinguishing between public safety and other critical infrastructure licensees in terms of rights to have their costs covered by any forced relocation of frequencies. Further, there is no basis for concluding that the \$500 million "pledged" by Nextel would be enough to compensate even public safety systems for the costs that would be incurred much less other licensees. For any plan to be viable, all such costs of relocation must be compensated.

It is no answer for Nextel to say that it should not be forced to bear the burden of unknown costs of relocation, because the costs will be created to accommodate Nextel's plan, whether Nextel bears them or not. If the costs are too great or the risk that estimates of costs too uncertain, then the plan shouldn't be instituted in the first place

and, instead, Nextel should modify and/or relocate in frequency its own systems so as to prevent the harmful interference of which it is the cause.

It is well to note, moreover, that under Nextel's plan, it alone would benefit by obtaining new spectrum in the 2 GHz band which, if auctioned, would almost certainly cost Nextel more than the \$500 million it "pledges" plus the value of the miscellaneous licensed frequencies which Nextel proposes to return, as to much of which Nextel has little use. It should be clear that this will not be a charitable contribution on Nextel's part and should not be so portrayed. If its so-called "compromise plan" goes forward, Nextel will derive enormous benefit, and it should pay the full cost that others would be forced to bear to achieve this windfall.

3. The Pledge Of Funds Must Be Guaranteed.

Before any relocation plan can be adopted the "pledge" of Nextel of funds to pay for the cost of others to relocate must be guaranteed. With all due respect to Nextel, the experience of the Commission, and the public, with the bankruptcies of Nextwave, Adelphia, Worldcom and others should inject more than a note of caution about accepting simply a "pledge" of funds.

Accordingly, while the cost of relocation will be difficult to estimate, the Utilities urge that any such "pledge" must be reflected in two ways: (1) an irrevocable performance bond from a major bank or other financial institution for the full amount of the estimated costs of relocation in frequency of all licensees required to do so to accommodate Nextel's plan, which bond must be unaffected by any change in Nextel's financial condition, including bankruptcy; and (2) a condition should be placed on all of Nextel's licenses received in connection with this proceeding requiring full payment of relocation costs, including any amounts over and above the initial estimate. The

licenses themselves should be pledged as security for such payment in such manner so as to avoid any possibility that Nextel's payment obligations might be discharged through bankruptcy or other proceeding or third party agreement without loss of the licensees (which then could be auctioned with the proceeds available for any additional required compensation).

4. Frequencies In The 800 MHz Band Must Be Made Available And Sufficient Time Allowed For Safe And Seamless Transition To New Frequencies; Cost Estimates And Timetables Need To Take Into Account The Special Environments In Which Many Of The Affected Systems Operate And The Need For The Continuous Operation and Availability Of Vital Communications Systems.

Beyond the basic issues of who will bear the cost and how will this be guaranteed, another major concern the Utilities have with the so called "compromise plan" is the failure of the proponents to come to grips with the complexities, and associated costs and time-consuming steps, involved in changing out systems. CP&L, for example operates an 800 MHz system in one of its nuclear plants, with some equipment within the containment area. Any change of equipment will require extensive documentation and testing, which must be approved by the Nuclear Regulatory Commission, to prove that there will be no interference to operations at the plant. Access to the nuclear plant is severely limited and any equipment that is replaced must be removed in a radioactive umbrella with extraordinary precautions and care taken as to its disposal.

Because of these kind of requirements, it is CP&L's general experience that work performed in a nuclear plant will cost 4-8 times that which might be expected for work in an ordinary business environment, and the planning, testing, and approval processes for a project that otherwise might take 6-8 months in an ordinary business environment, in a nuclear plant might take 3-4 years. Other utilities and other critical infrastructure licensees have their own special circumstances that will need to be addressed by any

relocation plan. Yet, to the Utilities knowledge, the proponents of the “compromise plan” have not even begun to scratch the surface as what would truly be involved by the proposed required change in frequencies.

A major reason for the seemingly blind eye that Nextel and others have shown to the practical difficulties and costs of the modifications that they propose would appear to be that someone else (the affected licensees), as Nextel sees it, must pay for the cost and be held to a timetable, however unrealistic. Placing the cost, where it belongs, on Nextel should help focus its attention. As for timetable, the Utilities urge that there is not enough of a record before the Commission to establish any firm dates, but as many of the systems involved took 5-7 years to implement in the first instance, it is unrealistic to suggest that a change of equipment could be accomplished in much less than that time.

How much, total, this will cost, and how long this will take can be subject to no better than a guestimate at this time. The base principle, however, must be that no critical infrastructure licensee should be required to vacate frequencies until other frequencies in the 800 MHz band, at the same location, permitting operation at the same power, bandwidth, and other technical parameters, are available for it to relocate, and all equipment necessary and qualified installation has been made available with sufficient time for the changeout of frequencies. All necessary arrangements must be made, including where needed temporary redundant facilities, with necessary funding, to ensure that there is no disruption of service. Finally, no licensee should be required to relocate frequencies more than once.

5. Stricter Conditions On Operations Throughout The 800 MHz Band Must Be Established.

While there is significant debate and question as to whether segmenting the band as proposed by Nextel will offer significant amelioration of the interference that has been experienced from Nextel’s operations, it is clear enough that band segmentation

and associated frequency relocation of licensees alone will not fully resolve the interference problems that have been experienced. Accordingly, additional operating restrictions of the kind proposed by UTC still need to be implemented, and not just for the non-cellular portion of the band, as would appear to be suggested by the “compromise proposal.” At very least, any Commission decision should make absolutely clear that Nextel’s relocation to another part of the band does not absolve it of its responsibility not to cause interference to other systems operating anywhere in the band.

IV. A FULLY-CROSS INDUSTRY TECHNICAL ADVISORY COMMITTEE SHOULD BE ESTABLISHED BY THE COMMISSION TO EVALUATE THE “COMPROMISE PLAN” AND OTHER PROPOSALS MADE IN THIS PROCEEDING FOR ALLEVIATING INTERFERENCE IN THE 800 MHZ BAND. THE PROPOSALS OF THAT COMMITTEE SHOULD BE SUBJECT TO A FURTHER NOTICE OF PROPOSED RULEMAKING.

The Utilities urge that the lack of a consensus among commenting parties in this proceeding reflects more than just disagreement among parties with competing interests, rather it demonstrates, at a more fundamental level, the need for a more thorough technical record to be developed from which a greater cross-industry consensus as to necessary, reasonable, and appropriate technical solutions for restrictions on operations in the 800 MHz band can be drawn. Rather than seek to develop such a consensus in the context of a proceeding in which it is suggested that one industry group or another might be forced to bear billions of dollars in expense by relocating its operations out of the band to satisfy the interference problems caused by others, the Utilities suggest that a better approach would be for the Commission, and the parties to this proceeding, to take a half a step back, to look more dispassionately at the causes of interference, potentially solutions, and costs associated thereunder.

Accordingly, the Utilities urge the Commission to establish a technical advisory committee with representatives from all affected, or potentially affected, industry

groups, expeditiously to review these issues and advise the Commission. Such an advisory committee should be charged, among other tasks, with identifying and to the maximum extent possible, reaching consensus agreement about the primary causes of interference, and the best, and most cost-efficient ways to address these problems. If some limited form of mandated change of licensee's frequencies is truly necessary, that too, with full consideration of the cost and practicalities of doing so, should also be addressed. Following the report of such committee, the Commission could then issue a more limited further notice of proposed rulemaking with specific proposals for limiting interference in the band. In the meantime, it should be incumbent upon those causing interference to take steps to remedy it, and for both these part(ies) and the recipients of harmful interference to report to this committee upon the efficacies of particular solutions that have been implemented.

V. THE MATTER OF WHETHER PUBLIC SAFETY REQUIRES ADDITIONAL SPECTRUM AND, IF SO, HOW SUCH NEEDS SHOULD BE ACCOMMODATED SHOULD BE CONSIDERED SEPARATELY FROM ISSUES OF INTERFERENCE IN THE 800 MHZ BAND.

The Utilities respectfully submit that one of the difficulties of this proceeding has been the effort to address two, if not three, very distinct issues in one proceeding. The primary issue in this proceeding should be how to remedy unacceptable levels of interference in the 800 MHz band caused by the operation of Nextel and potentially other cellular-type systems operating in the band. It is a wholly separate issue, whether there is a need for additional spectrum for public safety service and, if so, how best to accommodate that need. The Utilities make the recommendation not to minimize what may be the legitimate need for public safety systems to have access to additional spectrum, but to be sure that the loud call for such spectrum does not drown out, or at least unnecessarily distract from the effort to come to appropriate resolution of the particular issues involved with interference in the 800 MHz band.

Of course, in a time of increased national concern over public security, no one wants to suggest that public safety systems should be deprived of additional spectrum should it be necessary to protect the nation from terrorist acts. The events of 9/11 are on the minds of most Americans and so it is no wonder that references to these events and the need for Homeland Security are referenced in so many comments in this proceeding. At the same time, especially in a time of such national fervor, there is a need for caution when commercial interests seek to wrap their endeavors in a public safety banner.

So as to protect against this kind of confusion of issues and allow the Commission better to focus on the difficult, but the Utilities urge, still tractable interference issues at hand, the Utilities urge the Commission to bifurcate from this proceeding issues of interference in the 800 MHz band, on the one hand, and additional spectrum for public safety systems on the other, with each issue to be properly considered on its own merits. As for Nextel's still separate interest in acquiring contiguous spectrum for its cellular operations, the Utilities recommend that this be left to the commercial marketplace, where it belongs. To the extent rule changes may be necessary to accomplish this purpose, at most, they should be ones that permit, but do not require, the exchange of spectrum by Nextel and other entities.

Respectfully submitted,
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